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APPENDIX C

VOLUME III

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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APPENDIX C

TITLE 42
OF THE UNITED STATES CODE

§ 1320a-1 * * *

(a) The purpose of this action is to assure that Federal funds appropriated under subchapters V, XVIII, and XIX of this chapter are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such subchapters and that, to the extent possible, reimbursement under such subchapters shall support planning activities with respect to health services and facilities in the various States.

. . .

(b) The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate local public officials, shall make an agreement with any State which is able and willing to do so under which a designated planning agency (which shall be an agency

described in clause (ii) of subsection (d)(1)(B) of this section) that has a governing body or advisory board at least half of whose members represent consumer interests) will —

(1) make, and submit to the Secretary together with such supporting materials as he may find necessary, findings and recommendations with respect to capital expenditures proposed by or on behalf of any health care facility or health maintenance organization in such State within the field of its responsibilities,

(2) receive from other agencies described in clause (ii) of subsection (d)(1)(B) of this section, and submit to the Secretary together with such supporting material as he may find necessary, the findings and recommendations of such other agencies with respect to capital expenditures proposed by or on behalf of health care facilities or health maintenance organizations in such State within the fields of their respective responsibilities, and

(3) establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the designated agency and will be granted an opportunity

> for a fair hearing by such agency or person other than the designated agency as the Governor (or other chief executive officer) may designate to hold such hearings

whenever and to the extent that the findings of such designated agency or any such other agency indicate that any such expenditure is not consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act (or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963) to meet the need for adequate health care facilities in the area covered by the plan or plans so developed.

. . .

(c) The Secretary shall pay any such State from the Federal Hospital Insurance Trust Fund, in advance or by way of reimbursement as may be provided in the agreement with it (and may make adjustments in such payments on account of overpayments or underpayments previously made), for the reasonable cost of performing the functions specified in subsection (b) of this section.

. . .

(d)(1) Except as provided in paragraph(2), if the Secretary determines that —

(A) neither the planning agency designated in the agreement described in subsection (b) of this section nor an agency described in clause (ii) of subparagraph (B) of this paragraph had been given notice of any proposed capital expenditure (in accordance with such procedure or in such detail as may be required by such agency) at least 60 days prior to obligation for such expenditure; or

(B)(i) the planning agency so designated or an agency so described had received such timely notice of the intention to make such capital expenditure and had, within a reasonable period after receiving such notice and prior to obligation for such expenditure, notified the person proposing such expenditure that the expenditure would not be in confirmity with the standards, criteria, or plans developed by such agency or any other agency described in clause (ii) for adequate health care facilities in such State or in the area for which such other agency has responsibility, and

(ii) the planning agency so designated had, prior to submitting to the Secretary the findings referred to in subsection (b) of this section —

(I) consulted with, and taken into consideration the findings and recommendations of, the State planning agencies established pursuant to sections 246(a) and 291d(a) of this title (to the extent that either such agency is not the agency so designated) as well as the public or nonprofit private agency or organization responsible for the comprehensive regional, metropolitan area, or other local area plan or plans referred to in section 246(b) of this title and covering the area in which the health care facility or health maintenance organization proposing such capital expenditure is located (where such agency is not the agency designated in the agreement), or, if there is no such agency, such other public or nonprofit private agency or organization (if any) as performs, as determined in accordance with criteria included in regulations, similar functions, and

(II) granted to the person proposing such capital expenditure an opportunity for a fair hearing with respect to such findings;

then, for such period as he finds necessary in any case to effectuate the purpose of this section, he shall in determining the Federal payments to be made under subchapters V, XVIII, and XIX of this

chapter with respect to services furnished in the health care facility for which such capital expenditure is made, not include any amount which is attributable to depreciation, interest on borrowed funds, a return on equity capital (in the case of proprietary facilities), or other expenses related to such capital expenditure. With respect to any organization which is reimbursed on a per capita or a fixed fee or negotiated rate basis, in determining the Federal payments to be made under subchapters V, XVIII, and XIX of this chapter, the Secretary shall exclude an amount which in his judgment is a reasonable equivalent to the amount which would otherwise be excluded under this subsection if payment were to be made on other than a per capita or a fixed fee or negotiated rate basis.

(2) If the Secretary, after submitting the matters involved to the advisory council established or designated under subsection (i) of this section, determines that an exclusion of expenses related to any capital expenditure of

any health care facility or health maintenance organization would discourage the operation or expansion of such facility or organization, or of any facility of such organization, which has demonstrated to his satisfaction proof of capability to provide comprehensive health care services (including institutional services) efficiently, effectively, and economically, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of subchapter V, XVIII, or XIX of this chapter, he shall not exclude such expenses pursuant to paragraph (1).

. . .

(f) Any person dissatisfied with a determination by the Secretary under this section may within six months following notification of such determination request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review.

. . .

42 C.F.R. Part 100

§ 100.101 Applicability.

The provisions of this subpart are applicable to agreements entered into by the Secretary with the various States pursuant to section 1122 of the Social Security Act (42 U.S.C. Chap. 7), and to determinations made by the Secretary thereunder, for the purpose of assuring that Federal funds appropriated under titles V, XVIII, and XIX of the Social Security Act are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any such titles and that, to the extent possible, reimbursement under such titles shall support planning activities with respect to health services and facilities in the various States.

. . .

§ 100.103 Expenditures covered.

Any capital expenditure proposed by or on behalf of any health care facility or health maintenance organization,

the obligation for which is incurred by or on behalf of a health care facility or health maintenance organization after December 31, 1972, or after the effective date of the agreement entered into pursuant to § 100.104 by the Secretary and the State in which the health care facility or health maintenance organization is located . . . whichever is later, is subject to this subpart

. . .

(a)(1) For purposes of this subpart, a "capital expenditure" is an expenditure, including a force account expenditure (i.e., an expenditure for a construction project undertaken by the facility as its own contractor), which, under generally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance and which (i) exceeds $100,000, or (ii) changes the bed capacity of the facility with respect to which such expenditure is made, or (iii) substantially changes the services of the facility with respect to which such expenditure is made.

. . .

(c) Obligation: An obligation for a capital expenditure shall be deemed to have been incurred by or on behalf of a health care facility or health maintenance organization.

(1) When an enforceable contract is entered into by such facility or organization or by a person proposing such capital expenditure on behalf of such facility or organization for the construction, acquisition, lease or financing of a capital asset;

. . .

§ 100.104 Agreement; general.

The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate public officials, shall make an Agreement with any State which is able and willing to enter into such an agreement under which a designated planning agency (which shall be an agency described in § 100.105) will submit to the Secretary, together with such supporting materials as the Secretary may require, the following:

(a) With respect to each capital expenditure proposed by or on behalf of a health care facility or health maintenance organization in such State, the findings of such designated planning agency as to whether

(1) The designated planning agency or any other agency described in § 100.105 had been given notice of such proposed capital expenditure (in accordance with such procedure or in such detail as may be required pursuant to § 100.106) at least 60 days prior to obligation for such expenditure; and

(2) Such expenditure is or is not consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act (or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963) to meet the need for adequate health care facilities in the area covered by the plan or plans so developed.

(i) In reaching such findings, the designated planning agency shall consult with, and take into consideration the

findings and recommendations of, the other agencies described in § 100.105.

(ii) Where the designated planning agency finds that such expenditure is not consistent with such standards, criteria, or plans, it shall submit to the Secretary the findings and recommendations of all such other agencies with which it has consulted.

(b) With respect to each proposed capital expenditure which is found by the designated planning agency to be not consistent with the standards, criteria, or plans described in paragraph (a) of this section, its recommendation as to whether the Secretary should either

(1) Exclude, in determining the Federal payments to be made under titles V, XVIII, and XIX of the Act with respect to services furnished in the health care facility or health maintenance organization for which such capital expenditure is made, expenses related to such capital expenditure (in accordance with section 1122(d)(1) of the Act); or

(2) Not exclude such expenses, on the ground that such facility or organization has demonstrated proof of capability to provide comprehensive health care services efficiently, effectively, and economically, and that such an exclusion would discourage the operation or expansion of such facility or organization, or of any facility of such organization.

(c) With respect to each proposed capital expenditure which is found by any other agency described in § 100.105 to be not consistent with the standards, criteria, or plans described in paragraph (a) of this section within the field of responsibilities of such other agency, the findings and recommendations of such other agency.

(d) With respect to each proposed capital expenditure as to which the designated planning agency reaches a finding contrary to that reached by the local area planning agency described in § 100.105(a)(3), a statement of the reasons for such a contrary finding.

. . .

§ 100.107 Agreement; criteria for agency review.

The Agreement shall set forth the criteria under which the designated planning agency and the other agencies described in § 100.105 shall evaluate proposals for capital expenditures for purposes of this subpart to determine their conformance with the applicable standards, criteria and plans referred to in § 100.104(a)(2). Such criteria, to the extent provided for under such standards, criteria, or plans, shall include the following:

(a) Whether the proposed project is needed or projected as necessary to meet the needs in the community in terms of health services required: Provided, That projects for highly specialized services (such as open-heart surgery, renal transplantation, or radiation therapy) which will draw from patient population outside the community in which the project is situated will receive appropriate consideration;

(b) Whether the proposed project can be adequately staffed and operated when completed;

(c) Whether the proposed capital expenditure is economically feasible and can be accommodated in the patient charge structure of the health care facility or health maintenance organization without unreasonable increases; and

(d) Whether the project will foster cost containment or improved quality of care through improved efficiency and productivity, including promotion of cost-effective factors such as ambulatory care, preventive health care services, home health care, and design and construction economies, or through increased competition between different health services delivery systems.

§100.108 Determination by the Secretary.

(a) Except as provided in paragraph (b) of this section, if the Secretary determines that (1) the designated planning agency has not been given timely notice of intention to make a capital expenditure in accordance with § 100.106, or (2) that the designated planning agency has, in accordance with the requirements of section 1122 of the Act

and this subpart, submitted to the Secretary its finding that such expenditure is not consistent with the standards, criteria, or plans described in § 100.104(a)(2) then, for such period as he deems necessary to effectuate the purpose of section 1122 of the Act, he shall, in determining the Federal payments to be made under titles V, XVIII, and XIX of the Act to such health care facility or health maintenance organization, exclude expenses related to such capital expenditure.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the Secretary, after submitting the matters involved to the National Advisory Health Council on Comprehensive Health Planning Programs (established pursuant to section 316 of the Public Health Service Act, 42 U.S.C. 247a) and after taking into consideration the recommendations of the designated planning agency and the other agencies described in § 100.105 with respect to such expenditure, determines that an exclusion of expenses related to any capital expenditure of any

health care facility or health maintenance organization would discourage the operation or expansion of such facility or organization, or of any facility of such organization, which has demonstrated to his satisfaction proof of capability to provide comprehensive health care services efficiently, effectively, and economically, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of titles V, XVIII, or XIX of the Act, he shall include such expenses in Federal payments under such titles.

(c) Upon making a determination under this section the Secretary will promptly notify the person proposing such capital expenditure, the designated planning agency, and the other agencies described in § 100.105 with which the designated planning agency has consulted, or such determination and the basis for such determination.

(d) Any person dissatisfied with a determination by the Secretary under section 1122 of the Act or this subpart

with respect to a particular capital expenditure may, within six months following the date of such determination, request the Secretary to reconsider such determination.

(1) Such request for reconsideration shall be in writing, addressed to the Secretary of Health, Education, and Welfare or to any officer or employee of the Department of Health, Education, and Welfare or to any officer or employee of the Department of Health, Education, and Welfare to whom the Secretary has delegated responsibility to receive such requests, and shall set forth the grounds upon the record of the proceedings and any issues of law, upon which such reconsideration is requested.

(2) Reconsideration will be based upon the record of the proceedings, which shall consist of the findings, recommendations and supporting materials submitted to the Secretary by the designated planning agency (including the findings and recommendations of other agencies) which relate to the findings and recommendations involved, the record

of the hearing provided by the designated planning agency, if any, and of any judicial proceedings, the materials submitted in connection with such request, and such comments as the Secretary may request from the designated planning agency.

(3) Notice of any reconsidered determination under this paragraph shall be sent to the designated planning agency and the person requesting such reconsideration.

(e) A determination by the Secretary is, under section 1122 of the Act, not subject to administrative or judicial review.